IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 90
5337761

	BETWEEN	RUDY PONCE Applicant
	AND	SHIPCO MARINE CONSTRUCTORS LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	A Hutchinson, advocate for applicant D Grindle, counsel for respondent
Investigation meeting:	1 February 2012 at Whangarei
Determination:	9 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rudy Ponce says he has a personal grievance in that his employer, Shipco Marine Constructors Limited (Shipco) harassed and bullied him into taking English lessons. He says this action was an unjustifiable action of his employer's which affected his employment to his disadvantage.

[2] Shipco denies that Mr Ponce was harassed and bullied into taking English lessons, and says that any grievance in that respect was not raised within the 90-day period required under s 114(1) of the Employment Relations Act 2000. That matter has been investigated together with the merits of the grievance.

[3] Mr Ponce also seeks payment of a ship repair allowance to which he says he is entitled under his employment agreement, as well as payment for time spent attending the English lessons. Shipco denies that the first of these payments is owed, on the

ground that the work in question was not repair work. It also denies that payment is owed for time spent attending the English lessons.

The personal grievance

1. Background

[4] Shipco recruited Mr Ponce in the Philippines. He was to work as a pipe fitter at Shipco's shipyard in Whangarei. His employment began in September 2008.

[5] Some 5 other Filipino workers were recruited at the same time as Mr Ponce, and subsequently more were employed. By about February 2009 a director, Pat Ganley, became concerned about the adequacy of the English language skills on-site. He believed the skill levels were such that they posed a safety risk. He met with the workers to propose that English language lessons be offered to them by a qualified tutor, and said the workers considered this a good idea.

[6] Initially the lessons were conducted on-site once a week for two hours after work. The tutor was paid, and payments were deducted from the employees' wages. A dispute about the deductions was resolved in or about September 2010 by the repayment of the deductions to the employees concerned, including Mr Ponce.

[7] After the tutor left, the lessons were conducted by Mr Ganley or one of the foremen in two one-hour sessions per week. No further charges were levied for the tutorials after December 2009.

[8] Mr Ponce's English is good. He said he suggested to Mary Anne Calustre, a member of the management team, that it was not necessary for him to attend the lessons. His evidence was that Ms Calustre said everyone was obliged to attend, and threatened several times to have him sent back to the Philippines if he refused to attend. Ms Calustre denied that account, and said further that when another of the Filipino workers asked her if it was true that people who did not attend the lessons would be sent home, she said 'no'. She said two workers who did not attend the lessons, or did so sporadically, were not sent home.

[9] Allegations of this kind form the basis for the allegations that Mr Ponce was bullied and harassed into attending the lessons.

[10] Mr Ponce stopped attending English lessons in May 2010. He said that was because the foreman told him he would not be obliged to attend.

2. Raising a personal grievance

[11] Mr Ponce went home to the Philippines for the Christmas-New Year break of 2010-2011. While there he met a former employee or employees of Shipco, who informed him of a claim that had been taken on their behalf in respect of the English lessons. Mr Ponce said that is when he realised it was wrong of Shipco to force employees to attend English lessons, and that it was wrong of Shipco to have deducted payments for the lessons from their wages.

[12] On the recommendation of his colleagues he sought the assistance of their advocate on his return to New Zealand.

[13] As a result, Mr Hutchinson wrote a letter dated 13 February 2011, in which he advised that Mr Ponce had approached him to put forward a personal grievance. He did not otherwise identify the grievance, rather he sought information about Mr Ponce's hours of work. In a second letter dated 21 February 2011 he raised concerns that, among other matters now withdrawn, Mr Ponce had been bullied and threatened into attendance at English lessons. The letter also sought the payments which are also part of this employment relationship problem.

3. Whether grievance raised in time

[14] Section 114(1) of the Employment Relations Act provides:

> *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4) raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, which ever is the later, …*

[15] Mr Hutchinson submitted that Mr Ponce's personal grievance was raised in the letters of 13 and 21 February, and it was raised in time because the 90 day period commenced with the date on which it came to Mr Ponce's attention that the employer's actions were wrong. That had occurred over the Christmas-New Year break.

[16] The applicable test concerns knowledge of the actions themselves, not knowledge of whether they were lawful. The actions were the alleged acts of bullying and harassment. Mr Ponce was aware of them and they came to his notice when they occurred. Although the dates of these actions were not entirely clear, they certainly occurred before May 2010.

[17] Mr Ponce's personal grievance was not raised in the time required under s 114(1). It cannot proceed.

4. Leave to raise the grievance out of time

[18] Although no request for leave to raise the grievance out of time was made under s 114 (3) and (4) and s 115, I would be unlikely to find that exceptional circumstances existed and that leave should be granted. In that respect I note that the parties had entered into a written employment agreement, which included the required information about raising and resolving personal grievances.

The claims for payment

1. Ship repair

[19] Clause 7.2 of the employment agreement provided:

> *The employee shall receive $2.50 per hour when working on a ship repair*

[20] In or about June 2010 the vessel *Marlin HQ*, which was registered as a fishing vessel, was being converted from a prawn trawler to a pleasure vessel to be known as *Pacific HQ*. The conversion required the vessel's re-classification and registration as a motor yacht. The associated work was subject to regulatory control and was very

extensive, although it included the removal of old pipes and their replacement with newly-manufactured pipes in which Mr Ponce was engaged. Shipco says the work amounted to a re-fit.

[21] Although the extent of the work was discussed during the investigation meeting I do not record it here because Mr Hutchinson's argument was that no difference between ship repair and ship re-fit work has been observed in practice, and for the purposes of the payment of the repair allowance. He did not seek to say the work was repair work, and if I have misunderstood him on that point then I would not accept that the work can reasonably be described as repair work.

[22] There was no evidence beyond Mr Hutchinson's assertion to the effect that by custom and practice there is no difference between ship repair and ship re-fit work.

[23] Accordingly I do not accept there is such a custom and practice and decline to make the order for payment sought.

2. Attendance at English lessons

[24] Clause 7.6 of the employment agreement provided:

> *… where the employee is required to work overtime, the employee shall be entitled to payment for each hour of overtime at the rate of $35.45 per hour. To qualify for this rate 40 hours of ordinary time must have been worked.*

[25] Mr Ponce seeks payment for 106 hours of attendance at the English lessons, paid at the overtime rate.

[26] The number of hours in question was confirmed in a record headed 'timesheet history'. However Shipco says the payment is not owed because attendance was not compulsory.

[27] Unfortunately Mr Ponce's evidence on the point was unfocussed and inconsistent. Although he alleged that he was required to attend the lessons, when pressed to discuss in more detail the nature of the alleged pressure on him to attend he gave hearsay examples of other employees' experiences and said that if statements of

that kind were made to one employee then they were made to all employees. When I asked him for details of conversations in which Ms Calustre allegedly informed him all employees were to attend the lessons, he responded by referring to other areas of dissatisfaction with Ms Calustre. It is possible that at least some employees had an unsatisfactory standard of English and their attendance at lessons may in effect have been compulsory. However nothing in Mr Ponce's account amounted to evidence that Mr Ponce himself was instructed to attend lessons when he queried whether his attendance was necessary.

[28] Accordingly I am not persuaded that his attendance was compulsory and there will be no order for payment.

[29] I record that a former Shipco employee, and with whom Mr Ponce had spoken over the Christmas-New Year period, provided a statement to the Authority which contained information about a settlement of that employee's employment relationship problem. The employment relationship problem was lodged in the Authority and was subsequently settled on a confidential basis in mediation. That certain details of the settlement are contained in the statement is a breach of either or both of s 148 of the Employment Relations Act and the terms of settlement. The advocate should not have obtained or passed on the statement. It is inadmissible and I disregard it.

Costs

[30] Costs are reserved.

[31] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority